

Featured Columnist: Dr. Jharna Chatterjee

Restorative Justice: the Legal System Takes a Cue from Native Aboriginal Methods

By Dr. Jharna Chatterjee

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"**David Milgaard** was sentenced in 1970 to life imprisonment for the 1969 murder of Saskatoon nursing aide Gail Miller. Milgaard spent 23 years in prison. He was subsequently cleared by DNA evidence five years later. "

Feb. 15, 2007

CBC News

"In 1997, **Simon Marshall** was arrested and charged with 15 counts of sexual assault. The mentally handicapped Marshall...confessed to the crimes, and was released in 2003. Soon after his release, Marshall was arrested on three more counts of sexual assault. Again, he confessed, although DNA tests eventually showed he was not guilty." Feb. 15, 2007, CBC News

"The case of **Earl Washington, Jr.** is one of remarkable firsts. ... Although numerous habeas corpus petitions cast doubt on his conviction—from lack of evidence and police misbehavior to poor legal representation during his trial—a DNA test finally exonerated him nine years later, in 1993. But Virginia Gov. Doug Wilder merely commuted Washington's death sentence to life imprisonment because the state's "21-Day Rule" dictates that a defendant has only three weeks after sentencing to introduce new exculpatory evidence. When another DNA test in 1999 reinforced Washington's innocence and provided a direct match to another suspect, Gov. Jim Gilmore at last pardoned Washington. By then, Washington had served 18 years in prison, nine of them on death row." (University of Virginia. Alumni Association)

BBC on this day: October 3, 1995 (bbc.co.uk): OJ Simpson verdict: 'Not guilty'

"**OJ Simpson** has been found not guilty of the murders of his ex-wife Nicole and her friend Ronald Goldman. The jury took less than four hours to reach a unanimous decision... Nicole Brown Simpson and Ronald Goldman were stabbed to death... Prosecuting lawyers produced evidence such as a pair of gloves—one found at the crime scene, the other at OJ's apartment. ... Summing up, defence lawyer Johnnie Cochran alluded to an institutional racism which the jury had the power to redress. Members of the victims' families were distraught: Fred Goldman, father of Ronald Goldman, said the day of his son's murder was the worst day of his life, and today was the second. 'I deeply believe that this country lost today. Justice was not served,' he said. "

Family members attending court proceedings for a violent crime against one of their own quite often feel that justice has not been done, that the sentence did not reflect the seriousness of the crime. Some people argue that it is possible for clever defense lawyers to utilize legal loopholes and to influence trial outcomes even when their clients might in fact be guilty. In some other instances, innocent individuals walking to the death chamber proclaim their innocence with their

last breath. Ten or twenty years later after a conviction, DNA evidence clears some of the people serving a wrongfully imposed life term in prison. Bank tellers subjected to hold-ups or victims of Break and Enter sometimes suffer from lingering nightmares and a deep feeling of insecurity, even of debilitating anxiety. The police often lament about the misguided youth going through a revolving door.



Figure of Blindfolded Justice by Shomit Sengupta

I have discussed this issue with all ranks of police officers—from the junior-most to the senior levels, academics and senior judges, who commented that juvenile offenders in particular, when sent to correctional institutes, get "post-graduate training in crime." Such incidents are not too rare in mass media, novels, or anecdotes. What all of them have in common is the perceived **inadequacy of the 'retributive' legal system**, as some sociologists, criminologists, and legal experts believe (for example, Howard Zehr; Justice William Vancise; Justice Jean-I Dutil; Chief Constable Charles Pollard, UK; John Braithwaite, Daniel Van Ness).

By its very nature, the retributive justice system is adversarial. It is characterized by a "due process"—a whole regimen of intricate laws that are in place to ensure a fair and equitable treatment of all people (represented by the scales in legal institutions), in an unbiased, non-prejudiced manner (represented by the statue of a blindfolded Goddess of Justice). The accused and especially

the victim most often are passive observers in the court, with lawyers fighting the legal battle with the sole objective of winning the case—not necessarily always concerned about serving the cause of justice. The objective of the prosecutor is to establish beyond reasonable doubt the guilt of the accused—of breaking laws, of committing a crime against the state. On the other hand, the accused, even when he/she is guilty, is most often encouraged by the defense lawyer to plead 'not guilty' or to get some advantage by 'plea bargaining.' Truth, in many cases, is the ultimate victim in the crossfire of technical ammunitions. At present, in many jurisdictions, the victims have the right to submit a victim impact statement—but they have no way to find the answers to their many nagging, personal questions, such as 'Why me/him/her?' 'Why did he/she do it?' and 'Is he/she going to harm me or my loved ones again, if he/she can?' Their need for closure is not always met.

"Aboriginal concepts of restorative justice...stress... that crime harms people, communities, and relationships, and the objective of justice is to repair the harm, and heal the people involved, including the accused."

Restorative justice, a philosophy that found a niche in the hearts of many law enforcement and legal professionals, scholars, reformers, religious leaders, and ordinary citizens,* is an attempt to provide us with an alternative means for seeking justice. "...[T]he rise of restorative justice has been influenced by the activities of Aboriginal groups in Canada, Australia, and New Zealand, as they have called for self-determination and control over the justice systems that affect them. Aboriginal concepts of restorative justice tend to be strongly focussed on the community, with an emphasis on collective well-being rather than individual rights. They stress the need to heal relationships between clans or family groupings as well as between the offender and the victim, so that balance may be restored to the community as a whole." (Page 6, Department of Justice Canada Consultation Paper, 2000).

The central idea in the philosophy of restorative justice is that crime harms people, communities, and relationships, and the objective of justice is to repair the harm, and heal the people involved, including the accused—not primarily to ascertain his/her guilt or to weigh the seriousness of the crime with a view to determine the nature and magnitude of punishment deserved (the third element in the Statue of Justice, the sword in her hand). The 'community of care' and the 'community of impact' gather together to achieve this objective and under the guidance of a trained neutral coordinator, discuss the nature and extent of impact the offense had, and how the harm can be minimized or eliminated in order to heal the accused, the victims, and the community as a whole by restoring harmony in the damaged relationships. The supportive people of the accused and the victim constitute the 'community of care,' and the 'community of impact' includes everyone who has been affected by the crime, even the accused person's family and friends. Everyone, including the accused and the victim takes active part in the discussion around the 'problem' and its possible solution. Admission of guilt, shame, apology, and genuine repentance is an essential component in the process, as is the victims' full and detailed expression of how the offense affected them. Consensus of the participants regarding the 'reparation agreement' (a contract) is also essential.

In his 1997 book "Return to the Teachings", Rupert Ross, a Canadian prosecutor and a proponent of restorative justice said: "First one must deal with the shock and then the dismay on your neighbors' faces. One must live with the daily humiliation, and at the same time seek forgiveness not just from victims, but from the community as a whole.... **[A prison sentence] removes the offender from the daily accountability, and may not do anything toward rehabilitation, and for many may actually be an easier disposition than staying in the community.**" (Page 18)

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Let me tell you a true story.

It was an extraordinary sight. Jack—the heart-throb of all young female students at the college, a good looking young man with scholarship potential for his next educational step, and the captain of the college hockey team—was sitting with his face buried in his two hands, trying to become invisible. The Dean, the house parents, and the social worker looked on, obviously distressed, as the girls in the room were trying to control their sobbing. Finally, Jack looked up and said, "You probably won't believe me, but I didn't realize how much I was hurting you. I am sorry." Gone was his arrogant smirk, and his macho posture; he was shaking and desperately trying to control himself.

This incident was taking place at a residential college where for months, female students had been complaining of harassment by Jack and his followers. They were often victims of obscene and hurtful comments from these young men and had been experiencing various emotional problems. Some of the girls had left the college and never returned. Some were on the verge of a nervous breakdown. Finally, encouraged by a house parent, a few of these teenage girls came forward and lodged an official complaint against Jack. They had written records of some of the comments that had been hurled at them. The Dean considered the situation serious enough to call the RCMP

(Royal Canadian Mounted Police). The officer who responded to the call decided to hold a Community Justice Forum (a form of Restorative Justice). The participants were Jack, two of his close friends, Jack's house parent, the Dean, the college social worker, six girls, their house parents, and the RCMP officer acting as the coordinator/facilitator of the forum.

The forum started with Jack admitting the abuse defiantly and defensively. He sat slouching in the chair, staring at the other participants, with his hands casually thrust in his pockets. Then the victims were given an opportunity to talk. The first victim exploded in a burst of anger and tears at first, then described how the harassment had affected her life at the college—her sleep, her self-confidence and her academic performance. One after the other, the story was repeated by the other victims, with slight variations. The Dean, the social worker, and the house parents all expressed their frustration at not being able to solve the problem before, as the girls themselves were afraid to say anything publicly for a long time. Gradually, Jack's hands came out of his pockets, and he started wringing them. His face looked pale, and he was sweating.

Finally, it was time to decide the outcome of this forum. Expulsion was suggested by someone. But the girls did not want Jack expelled. They did not even want him to apologize at the general assembly of the college as it would be stigmatizing. They said that they were satisfied with Jack's apology and a promise from him to tell other boys to stop the harassment. Jack, who had arrived at the forum reluctantly, assuming that everyone was out there to 'get' him, was overwhelmed at his victims' forgiveness. On his own initiative, he went to all male residences and requested the students to treat the girls with proper respect. Everyone who participated at this forum felt that justice was done. Two years later, I interviewed him at the college where he had just voluntarily come to coach other students for an unofficial sports event. He was a polite, happy, and energetic young man with a bright future.

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The restorative justice process has been utilized most often in cases of property crimes or assaults and/or threats, and most often with juvenile offenders. However, in some serious cases, even the mother, father, or spouse of a murder victim wanted to meet with the perpetrator for an opportunity to find closure, and sometimes, to forgive. Examples of a few cases where restorative justice has been successfully (i.e., both parties expressed satisfaction with the outcome) utilized by the RCMP officers were: breach of probation and uttering threat by an adult male—the agreed upon reparative action was for him to attend AA, undergo treatment, and counsel youth; sexual harassment in a bar by an adult bar tender and a bar manager—the agreed upon actions were for the accused to attend harassment workshop and post policy against harassment in the bar; public mischief (arson) by two young adults—they had to attend counselling, pay back the insurance company each month, and perform community work with the insurance company or the police to earn money; theft of cheques and forgery by a young adult female, an aspiring Early Childhood Education teacher—she paid back the money immediately, and expressed shock to learn that criminal record would have ended her career aspirations. As mentioned before, verbal or written apology was always present in these cases, usually spontaneous. Interested readers may also read another article** on restorative justice that describes the results of a number of randomized trials to examine the effects of restorative justice.

It must be emphasized, however, that restorative justice is not a panacea—it is only one of the tools in seeking justice, and should not be applied in dealing with all types of offences, at least as a pre-trial diversion. A lot of criticisms have been made against using it indiscriminately, especially for domestic violence and sexual abuse cases where the victims feel unsafe, cheated and not healed—while the perpetrator, in their opinion, gets off too easily. Another criticism is that traditional Aboriginal “sentencing circles” did not always culminate in reconciliation and forgiveness—often there were harsh punishments such as banishment (in ancient, remote, tribal societies up in the North it could amount to a death sentence), extensive reparation, and even death, for committing serious crimes.

There are a variety of issues related to a widespread use of restorative justice in its various forms e.g., victim-offender mediation, sentencing circles, family group conferencing, or community justice forums. Some of these issues, discussed in detail in the paper cited above are: how can the accused person's rights to a fair trial be balanced with the need for the community to participate; how to ensure that the victim can participate in the process without feeling pressured or stressed or feeling re-victimized; what is the appropriate role of police and other government officials in administering restorative justice.

Restorative Justice sessions have been utilized with convicted murderers and other serious offenders in prison settings. Some examples can be found on the Internet, at gbarton@journalssentinel.com described by Gina Barton and Mary Zahn.

Author's Note: Background to this article: The Royal Canadian Mounted Police (RCMP) implemented a form of restorative justice called "Community Justice Forum" across the national police organization in January 1997, as a discretionary option. It also trained many officers from Provincial police organizations, school- and college teachers, and other interested community members to coordinate/facilitate Community Justice Forums in appropriate cases. Many police officers started (and in a few locations still continue) to utilize this alternative way of righting the wrong. In 1999, an Assistant Commissioner of the RCMP asked me to evaluate this initiative. I started to read available literature extensively, and travelled from one end of the country to the other, talking to offenders and their supporters, victims and their supporters, as well as police officers, and wrote two reports in 1999-2000. I had begun the project as an objective researcher, but after talking to so many who had been directly involved in the process, I could feel its power and became a believer. Later, I had the privilege of presenting my findings at the Real Justice Conference in Minneapolis, USA, and at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna, 10-17 April 2000.

The idea of Restorative Justice is not new – it has been practiced among many aboriginal tribes worldwide since ancient times; in South Africa "The Truth and Reconciliation" initiative that took place a few years ago can be considered as one of its expressions. At present, variations of restorative justice are still practiced by some in Australia, New Zealand, Canada, the UK, the USA and some other countries. However, frustrations with achieving justice as described above still continue.

*The Little Book of Restorative Justice, by Howard Zehr.

**Restorative Justice: the Evidence, by Lawrence W Sherman and Heather Strang In collaboration with Geoffrey Barnes, Sarah Bennett, Caroline M Angel, Dorothy Newbury-Birch, Daniel J Woods and Charlotte E Gill: Jerry Lee Program of Randomized Trials in Restorative Justice, The Smith Institute www.esmeefairbairn.org.uk/docs/RJ_exec_summary.pdf